(EMB-7337)
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Our File No. 1967-001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
NEWARK DIVISION

INTERACTIVE MEDIA ENTERTAINMENT AND GAMING ASSOCIATION, L.L.C., a limited liability corporation of the State of New Jersey,	:	CIVIL ACTION
	:	Case Number 07-2625 (MLC)
Plaintiff,	:	AFFIDAVIT IN SUPPORT OF MOTION FOR REQUEST FOR TEMPORARY RESTRAINTS.
-vs-	:	
ALBERTO GONZALES, Attorney General of the United States, THE FEDERAL TRADE COMMISSION and THE FEDERAL RESERVE SYSTEM,	:	
Defendants.	:	

EDWARD LEYDEN, of full age, upon his oath hereby deposes and says:

1. My name is Edward Leyden, I am an attorney at law of the District of Columbia, in good standing, and I am over eighteen (18) years of age. I am under no duress or undue influence in making this affidavit in support of Plaintiff iMEGA's application for issuance of an order to show cause why the court should not restrain the implementation.

Dockets.Justia.com

2. My background is in regulation, contracting, legislation, review and advice to clients in the areas of banking and finance for clients throughout the world, and in particular in relation to Internet based financial transactions.

3. Plaintiff, Interactive Media Entertainment and Gaming Association, L.L.C., (hereinafter referred to as "iMEGA") is a limited liability corporation formed under the laws of the State of New Jersey, with its office and principal place of business at 1850 K Street, N.W., International Square, Suite 390, Washington, DC 20006. iMEGA is a not-for-profit corporation duly formed and constituted under the laws of the State of New Jersey and I am its Executive Director.

4. iMEGA represents the interests of persons and companies which provide Internet interactive entertainment or "gaming." "Interactive" entertainment is entertainment conducted over the Internet between individuals with access to a personal computer or laptop and server based programs belonging to individuals or companies, where the activity is on-going and conducted in real time between the person and the program. iMEGA engages in the collection and dissemination of information and advice regarding such services, the legislative and legal landscape affecting such services, and liaison between its members and members of the general public in various media, including speech, print and Internet media. iMEGA itself does not engage in any interactive electronic gaming by and through the Internet as hereinafter described.

5. iMEGA members and persons or companies whose interests are represented by iMEGA's activities engage in electronic gaming over the Internet, and some of its members are individuals or business entities engaged in the business of providing

interactive entertainment services to individuals through use of personal computers, both with and without a fee, for the said entertainment services.

6. Among other entertainment services, some of iMEGA's members provide an Internet gambling opportunity to private individuals located both within and beyond the territorial borders of the United States of America as a form of entertainment which can be engaged in by persons within the privacy of their homes and/or other places using private personal computers.

7. iMEGA members and persons or companies whose interests are represented by iMEGA's activities are located within the territorial limits of the State of New Jersey, in all fifty (50) states of the United States and its territories as well as Tribal lands, and throughout the world.

8. Immediately prior to October 13, 2006, the date on which President George W. Bush signed the Unlawful Internet Gambling Enforcement Act, 31, *U.S.C.* § 5361, *et seq*., some of iMEGA's members engaged in the business of maintaining websites known as "Internet Casinos," which are a computer image generated and supported by computer technology and accessible to anyone wishing to engage in games of chance and skill, including, but not limited to wagering on these games of chance or skill.

9. An Internet Casino operated by an iMEGA member functions generally like this.

a. A gambler directs the browser, or search device, of his computer to an Online casino website.

b. The gambler is advised that he will receive a gambling credit or "chip" for each dollar that he deposits and is instructed to enter his billing information.

c. The gambler can use a credit card, a debit card drawing funds on his account, telephone, wire transfer, money order and/or personal check or other transaction to purchase a gambling credit.

d. The gambler can then place wagers with any of the games located on the site, which are computer generated and administered.

e. Any winnings are separately transferred to the gambler's account and any losses are debited against the account.

f. In the case of credit cards, the issuing institution debits losses against the account of the cardholder.

10. Persons wishing to engage in games of chance or skill and betting or wagering on them through iMEGA members' Internet Casinos may originate such an activity while located anywhere in the world, including but not limited to any jurisdiction of the United States, where gambling in general and Internet gambling specifically may be legal, illegal and/or otherwise regulated and of which iMEGA members may or may not know.

11. UIGEAs who engage in games of chance or skill and betting or wagering on them through Internet Casinos prior to October 2006 were able to do so by transmitting funds belonging to them by wire transfer, debit card, credit card transaction, by mail or by other means to Internet Casinos of iMEGA members. Transactions are processed through financial instruments known as "payment system instruments." A payment system instrument can consist of checks, wire transfers, debit card or direct debit transactions, electronic transfer, or credit card transactions

12. Such credit transactions of necessity involve transfer of funds of the persons wishing to engage in the particular activity through financial institutions which provide or

process payment system instruments including, but not limited to, banks, clearing houses and the Federal Reserve System itself.

13. The actual transfers of funds by said financial institutions including, but not limited to, banks, clearing houses and other financial institutions licensed or regulated by the Federal Reserve System, other third party financial or finance-related organizations, or credit card issuing companies, does not involve the wagering or betting of any thing of value and does not involve, implicate or rely in any way upon any luck in order to accomplish the transaction which is requested by the bettor and accepted by the Internet Casino.

14. In my experience no such said financial institutions such as banks, clearing houses and other financial institutions licensed or regulated by the Federal Reserve System, other third party financial or finance-related organizations, or credit card issuing companies, offer any form of betting or wagering for money, but only engage in the business of transfer of funds.

15. In my knowledge and experience companies may assess a small and set fee for the use of their services which is not tied to or dependent upon the placing, winning or losing of a bet or wager in any way. However, credit card companies usually assess a financial transaction fee of 1% or 2% of the transaction against the commercial recipient or transmitter of the transaction amount.

16. iMEGA members, and those persons or companies whose interests are represented by iMEGA activities, maintain such computer technology and computer servers at locations located within and outside the United States. In the locations where iMEGA members or those persons or companies whose interests are represented by

iMEGA activities maintain their computer servers, programming and data storage, wagering on games of chance and/or skill via the Internet is a legal activity permitted by law therein.

17. In the business community and, to my experience, in the legal community the location of the server which operates the software which gives rise to the computer generated image of the particular website, and engages in the computer based interaction, is considered the location of the business in the absence of any "brick and mortar" location.

18. In some, but not all, of the jurisdictions where iMEGA members, or those persons or companies whose interests are represented by iMEGA activities are located, offering or accepting sums of money by wire transfer, credit card or debit card transaction, or by mail or telephone transfer is a legal activity permitted by law therein.

19. In some, but not all, of the jurisdictions where iMEGA members, or those persons or companies whose interests are represented by iMEGA activities are located, engaging in gambling where a UIGEA stakes only his or her private winnings, is a legal activity which is exempted from gambling regulations otherwise banning unlicensed gambling by law.

20. On or about October 13, 2006 Congress enacted a statute entitled "The Unlawful Internet Gambling Enforcement Act of 2006," codified as 31 *U.S.C.* § 5361, *et seq.* (hereinafter referred to as the "UIGEA"). A true copy of the Act is annexed as **Exhibit 1** and is incorporated as if more fully set forth at length herein.

21. The UIGEA creates an offense entitled "unlawful Internet gambling," which the Act defines as to "place, receive, or otherwise knowingly transmit a bet or wager by

any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received or otherwise made," according to 31 *U.S.C.* § 5362(10)(A).

22. Under the UIGEA, 31 *U.S.C.* § 5362(10)(A), unlawful Internet gambling means to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet is initiated, received or otherwise made.

23. Under the UIGEA, 31 *U.S.C.* § 5362(10)(E), the intermediate routing of electronic data does not determine the location or locations in which a bet or wager is initiated, received, or otherwise made, but the Act punishes as a criminal act any content-neutral transmittal of the funds used for a bet or wager if the originating or end point makes gambling illegal.

24. The UIGEA under 31 *U.S.C.* § 5362(3) defines the designated payment system which provides the payment system instruments as any financial transaction provider that the head of the Defendants Board or Commission determine "could" be used to finance Internet gambling. In my experience this definition applies to all payment system instruments including cash.

25. There are a number of exemptions contained in the UIGEA, including gambling on Tribal lands, 31 *U.S.C.* § 5362(10)(C), intrastate gambling according to state law provided that state law includes appropriate security standards to prevent minor

access, 31 *U.S.C.* § 5362(10)(B), Interstate Horseracing, 31 *U.S.C.* § 5362(10)(D), and fantasy sports leagues, 31 *U.S.C.* § 5362(10)(E)(ix).

26. The Act imposes criminal liability on any person or entity which violates 31 *U.S.C.* § 5363, including a term of imprisonment of up to five (5) years.

27. The Act punishes as a criminal act the knowing acceptance of any credit or electronic fund transfer by any person or entity such as some of iMEGA members aforesaid, in connection with the participation of another person in unlawful Internet gambling under 31 *U.S.C.* §5363(1-4).

28. The Act further permits the Defendant Attorney General and/or any duly empowered official of the Defendant Commission or Defendant Board, in addition to criminal penalties, to seek civil remedies including, but not limited to, injunctions which would restrain restricted transactions under the acts regardless whether a criminal prosecution has been initiated, pursuant to 31 *U.S.C.* § 5365(b)(1) or by an Attorney General or other appropriate official of the several states pursuant to 31 *U.S.C.* § 5365(b)(2).

29. The Act, 31 *U.S.C.* § 5364(a), further requires the Defendants Board and Commission, acting together with or apart from the Defendant Attorney General, to adopt regulations within two hundred and seventy (270) days of the effective date of the Act requiring the said financial institutions such as banks, clearing houses and other financial institutions licensed by the Federal Reserve System, financial services issuing instruments known as payment system instruments, as well as financial companies which have issued credit cards to persons wishing to engage in games of chance and/or skill and

wagering on them with the said Internet Casinos, to implement systems to identify and block, prevent or otherwise prohibit transactions which are restricted by the Act.

30. As of July 5, 2007 neither the FTC nor the Federal Reserve had introduced such regulations required by the I

31. Under the provisions of the Act, some of the members of iMEGA would face imminent and immediate criminal arrest and prosecution for engaging in the business of operating Internet Casinos which permit betting or wagering. Such prosecutions are already pending under other statutory Acts.

a. Prosecutions under the Wire Act, 18 *U.S.C.* § 1084, and other provisions of federal law are pending in the Eastern District of Missouri under Indictment No. 4:06-CR-337-CEJ (MLM) in the matter of *United States v. Carruthers, et al.* **Exhibit 2.**

b. An indictment has been returned under the Wire Act, 18 *U.S.C.* § 1084, and other federal laws, in the District of Utah in the matter of *United States v. BetUS, et al.,* for which no indictment number is currently available. **Exhibit 3.**

c. Criminal complaints have been unsealed in the Southern District of New York in the matters of *United States v. Lawrence* and *United States v. LeFebvre,* for which no docket number or indictment number is currently available.

32. Under the provisions of the Act as aforesaid, some of the members of iMEGA, and the persons or companies whose interests are represented by iMEGA's activities, face imminent financial ruin, closure, forfeiture and termination of their

employees if the provisions of the Act are implemented. In fact, iMEGA has collected, collated and disseminated information that:

a. A report from Price Waterhouse Coopers released through the Associated Press on June 22, 2007 estimates global Internet gambling is estimated to hit $144 billion dollars U.S. by the year 2011 and has been growing at a compounded rate of 7.20% per year since its high water mark of $101 billion dollars U.S. in 2006.

b. In early June 2007 two (2) large international Internet gambling companies, 888 and Partygaming, entered into negotiations with the United States Attorney General for the Southern District of New York for financial settlements although no present prosecutions are pending against the companies or their principals, due to the threats of enforcement of the Act.

c. According to press reports, Sportingbet, an international Internet gambling company, settled with the U.S. Attorney's office in Louisiana for $400,000.00 in exchange for warrants against its former Chairman Peter Dicks being dropped.

33. iMEGA has collected, collated and disseminated information that other persons and companies situated identically to or substantially similar to some of its have been prosecuted by the government under other laws, specifically the Wire Act, 18 *U.S.C.* § 1084, *et seq.*, for the conducting of Internet Casinos and that they have been subjected to arrest, house detention, prosecution, forfeiture and other criminal

proceedings and/or sanctions. In particular there are prosecutions pending in the Eastern District of Missouri, the District of Utah and the Southern District of New York.

34. On further information and belief, said financial institutions such as banks, clearing houses and other financial institutions licensed by the Federal Reserve System, financial services issuing instruments known as payment system instruments, as well as financial companies which have issued credit cards to persons wishing to engage in games of chance and/or skill and wagering on them with the said Internet or Online Casinos have discontinued the acceptance of funds transferred, deposited or secured by persons wishing to bet or wager with iMEGA members' Internet Casinos because of the imminent threat of criminal prosecution, forfeiture and other penalties under the Act as aforesaid, to the severe and continuing financial detriment of IMEGA members.

35. iMEGA members, and those persons or companies whose interests are represented by iMEGA's activities, who offer Internet gambling advertise their Internet Casinos in various media, including but not limited to on line and print magazines, periodicals, and on the Internet.

36. Advertising is a necessary incident to their commercial operations.

37. iMEGA members correctly and accurately represent that they operate legally in the country wherein they are incorporated and where their servers are located.

38. UIGEA further criminalizes as false the representation by iMEGA members that they operate legally in the country wherein they are incorporated and where their servers are located.

39. Support for the UIGEA's restrictions, and for prosecution of those situated in the same circumstances as iMEGA members under other laws including but not limited

to the Wire Act, has been justified by the need to regulate problem or addictive gambling, gambling by minors, and financial ruin from failing to control excessive or compulsive wagering.

40. iMEGA and its members have followed the debate in the media and in the Congress over regulation of Internet interactive gaming. In particular, after the passage of the UIGEA and the formation of iMEGA its members and employees reviewed the legislative debate over the bill.

41. There were several reasons advanced for the adoption of this act by sponsors and supporters. The sponsors of the UIGEA dealt with the subject matter, gambling on the Internet, as a moral dilemma, placing this legislation squarely on all fours with *Lawrence*. They cited cases of suicide, damage to the fabric of the American family, gambling by minors, and financial ruin. Other supporters cited loss of tax revenue from unregulated billions in gambling revenues. *Congressional Record*, 109th Congress Debate on H.R. 4411, July 13, 2006 at Govtrac.com/H.R. 4411 [109th]: Internet Gambling Prohibition and Enforcement Act.

42. Rep. Robert Goodlatte [R-VA], one of the sponsors, stated, "anecdotal evidences simply help to point out what is a magnifying problem of family problems, bankruptcy problems, problems with minors gambling, problems with addiction to gambling, problems with organized crime's being involved in gambling, all of which goes completely out of the purview of the States, which have jurisdiction over gambling in the United States." *Id.* at 18-19.

43. Adding further to the moral basis for the legislation, Rep. John Duncan [R-TN] stated "[s]everal million people already are addicted to one form of gambling or

another. This problem is going to grow, and many families will suffer if government keeps promoting gambling, and especially if it can be done by pushing a few buttons in the privacy and comfort of a home. The Internet is addictive for many people, anyway, and online gambling can be doubly addictive. We need to put modest and reasonable limitations in place on Internet gambling. . . . " *Id.* at 32-33.

44. Rep. Thomas Osborne [R-NE] opined that ". . . gambling causes poverty. It causes poverty, in many cases, as much as the wage actually paid an individual. It causes family dysfunction. It causes crime, embezzlement, theft. There is nothing that we can do right now at this particular time that I think is more germane to the welfare of families and people in the United States than this legislation. *Id.* at 35.

45. Opponents pointed out the gambling laws from state to state vary, that the bill had exceptions which allowed interstate gambling industries to continue due to other ongoing litigation, and that the legislation smacked of authoritarianism and infringement of fundamental rights. Rep. Shelley Berkley [D-NV] stated, "I was raised in Las Vegas, Mr. Speaker, where gambling is legal. . . . When it comes to gambling online, there is nothing, nothing, let me repeat that as loudly as possible for everyone to hear, there is nothing in this legislation that is going to protect college kids on campus from gambling online. We are talking about off-shore gambling sites, Internet sites that are outside of the reach of our judicial system and our regulators." *Id.* at 50-51.

46. Rep. Barney Frank [D-MA] questioned whether "gambling on the Internet does not add to the GDP or make America competitive. Has it become the role of this Congress to prohibit any activity that an adult wants to engage in voluntarily if it doesn't

add to the GDP or make us more competitive? What kind of social, cultural authoritarianism are we advocating here? " *Id.* at 79.

47. iMEGA's members engage in Internet Casino operations under the laws of various foreign flags and in states of the United States of America where such activities are legal, and in conformance with rules and regulations of those states or countries. As part of this activity, iMEGA members engage in activities, such as lobbying, marketing and publication, which are calculated to advocate for public and private rights of its members and those private individuals who use iMEGA members' Internet Casinos to engage in legal Internet Casino gambling. As part of this activity and the business activities of iMEGA members in general, iMEGA members engage in such activities to educate those persons in responsible, careful and financially safe entertainment, betting and wagering through legal Internet gambling.

48. Antigua and Barbuda, the same country which prevailed in the WTO dispute resolution which the United States is not contesting, recently introduced a set of revised regulations to continue industry-wide best practices and industry standards to further restrict problem and under age gaming, insure UIGEA fairness and the prevention of financial crime and fraud. *Antigua Now Using New Online Gambling Regulations for OnlinePoker*, PokerPages.com, Saturday, April 7, 2007.

49. iMEGA also keeps track of technological developments for its members and for the dissemination of news releases for the interactive media community. In particular, based on comments made about access by minors and others, including "gambling addicted" individuals, during the July 13, 2006 House debate over the Assembly version of the UIGEA, iMEGA has been working with its experts in computer

technology and monitoring the technical horizons for information related to "filtering," which is the process by which software can be programmed to limit or warn of access to websites which the user does not wish to occur. Recently, the Wall Street Journal reported on standard filtering software features built into standard software which operates most home computer system. In *Personal Technology from The Wall Street Journal, You Have Weapons In Your Computer To Monitor Your Kids,* June 14, 2007, All Things Digital Web site, http://walt.allthingsd.com, Walter S. Mossberg reported that embedded in available releases of the operating systems published by Microsoft (*i.e.,* Windows XP) and Apple (*i.e.,* OSX) that run approximately 90% of the personal computers currently in use in the United States are filtering applications that empower parents to not only control the Internet sites to which their children visit but also email the parents to notify them when and if their child has visited a prohibited site. He advised his audience that the latest versions of the two main computer-operating systems, Microsoft's Windows Vista® and Apple's Mac OS X Tiger®, have parental controls built right in. **Exhibit 4, attached.** These filtering software programs, which come installed in home computers, allow parents or those in control of the computers to prevent running selected web browsers or access to selected sites. Significantly, they can be set to filter out content as well, allowing a parent to eliminate access to any site providing a certain kind of content.

50. Because of the same debates iMEGA has begun to monitor research regarding gambling addictions. While the congressional debates cited studies showing that gambling, particularly on-line activity, was severely high among adults as well as minors, newer studies at the Division on Addictions, Harvard Medical School, appear to show

that rates may not be as high as believed, particularly as newer analytical methods are developed, and that minors tend to transition away from addictive behaviors in gambling as they approach the end of adolescence. **Exhibit 5,** LaBrie, Richard A., and Howard J. Schaffer, *Gambling with Adolescent Health,* 40 Journal of Adolescent Health 387-389 (2007).

51. I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I may subject to punishment.

Dated: ______________________

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EDWARD LEYDEN

[Notary Here]